A

Jacy ak Tintang (suing on behalf of himself and/or behalf of the other proprietors, occupiers holders and claimants of Native Customary Rights (NCR) land located within Kampung Merdang Gayam, Jalan Dato Mohd Musa, 94300 Kota Samarahan, Sarawak) & Anor v Mayan ak Nayang

B

C

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(IM)-1014–05 OF 2018
MOHAMAD ZABIDIN, LEE HENG CHEONG AND AHMAD NASFY JJCA
12 JULY 2022

D

Civil Procedure — Intervener — Application for — Appellants applied to intervene in respondent's proceedings for recovery of vacant possession of land — Whether court functus officio — Rules of Court O 15 r 6

E

Civil Procedure — Setting aside — Application for — Appellants applied to set aside order for possession granted to respondent — Whether application made out of time — Rules of Court O 42 r 13

F

The respondent filed an originating summons ('OS') against unnamed defendants for the recovery of vacant possession of an untitled parcel of land ('the untitled parcel'). The respondent admitted that the untitled parcel was a native customary rights ('NCR') land, and claimed that he was the owner. According to the appellants, the order for possession ('OFP') that was granted in favour of the respondent under the OS, was without their knowledge. The appellants had only found out about the OFP sometime in November 2017, when they had filed their respective Native Court claims for ownership of the NCR lands upon realising that there were trespassers. The appellants were taken by surprise when they received the respondent's defence filed in the Native Court together with some documents which included the OFP. The appellants applied to intervene in the proceedings and set aside the OFP pursuant to O 15 r 6(2) and O 89 r 5 the Rules of Court 2012 ('the ROC 2012'). The High Court held that the court was functus officio as the OFP had already been perfected at the time of filing of the application and in dismissing the application to set aside the OFP held that the filing of the application was out of time and was rendered academic. Hence, this appeal.

G

H

I

Held, dismissing the appeal with costs:

(1) The application by the appellants could not be said to have been made 'at any stage of the proceeding' as at the time when the application was made the oder had been perfected and accordingly there was no other proceeding pending (see para 53).

(2) Order 42 r 13 of the ROC 2012 used the word 'receipt' rather than 'service' of the order of judgment. Therefore, the appellants were deemed to have received the order in November 2017. As such the 30 days' time would have lapsed in December 2017. The appellants only filed the application to set aside the order for possession two months thereafter. Therefore, the court would not entertain such application as it was out of time (see para 55).

(3) Given that the appellants were not the occupant of the land they had no locus to bring this application pursuant to O 89 r 5 of the ROC 2012. The appellants had filed in one application seeking to be made co-defendant pursuant to O 89 r 5 of the ROC 2012 and at the same time made an application to intervene under O 15 r 6 of the ROC 2012. The requirements for each application were different. Given the different legal consideration that underlay each application it was undesirable for two separate applications to be lumped into one notice of application. Even if the same could be made, the appellants must pertinently abide by the requirements stated under O 15 r 6 and 10 of the ROC 2012 to establish that they had a legal interest. The appellants had failed to establish their legal interest on the land (see paras 58–60).

[Bahasa Malaysia summary

Responden memfailkan saman pemula ('SP') terhadap defendan yang tidak dinamakan untuk mendapatkan semula milikan kosong bagi petak tanah yang tidak mempunyai hakmilik ('petak yang tidak mempunyai hakmilik'). Responden mengakui bahawa petak yang tidak mempunyai hakmilik adalah tanah hak adat anak negeri ('HAAN'), dan mendakwa bahawa dia adalah pemiliknya. Menurut perayu-perayu, perintah milikan ('PM') yang diberikan memihak kepada responden di bawah SP, adalah tanpa pengetahuan mereka. Perayu hanya mengetahui tentang PM pada November 2017, apabila mereka telah memfailkan tuntutan Mahkamah Anak Negeri masing-masing untuk pemilikan tanah HAAN apabila menyedari terdapat penceroboh. Perayu-perayu terkejut apabila menerima pembelaan responden yang difailkan di Mahkamah Anak Negeri bersama beberapa dokumen termasuk PM. Perayu memohon untuk campur tangan dalam prosiding dan mengetepikan PM menurut A 15 k 6(2) dan A 89 k 5 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Mahkamah Tinggi memutuskan bahawa mahkamah adalah functus officio kerana PM telah pun disempurnakan pada masa pemfailan permohonan dan dalam menolak permohonan untuk mengetepikan PM memutuskan bahawa pemfailan permohonan itu di luar masa dan dianggap akademik. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Permohonan oleh perayu tidak boleh dikatakan telah dibuat 'pada mana-mana peringkat prosiding' kerana pada masa permohonan itu dibuat, perintah telah disempurnakan dan oleh itu tiada prosiding lain yang belum selesai (lihat perenggan 53).

(2) Aturan 42 k 13 KKM 2012 menggunakan perkataan 'diterima' dan bukannya 'penyampaian' perintah penghakiman. Oleh itu, perayu dianggap telah menerima perintah itu pada November 2017. Oleh itu, tempoh 30 hari akan luput pada Disember 2017. Perayu hanya memfailkan permohonan untuk mengetepikan perintah milikan dua bulan selepas itu. Oleh itu, mahkamah tidak akan mendengar permohonan tersebut kerana ia di luar masa (lihat perenggan 55).

(3) Memandangkan perayu bukan penghuni tanah itu, mereka tidak mempunyai lokus untuk membawa permohonan ini menurut A 89 k 5 KKM 2012. Perayu telah memfailkan dalam satu permohonan yang bertujuan untuk dijadikan defendan bersama menurut A 89 k 5 KKM 2012 dan pada masa yang sama membuat permohonan untuk campur tangan di bawah A 15 k 6 KKM 2012. Keperluan bagi setiap permohonan adalah berbeza. Memandangkan pertimbangan undang-undang berbeza yang mendasari setiap permohonan adalah tidak boleh untuk dua permohonan berasingan digabungkan menjadi satu notis permohonan. Walaupun perkara yang sama boleh dibuat, perayu mesti mematuhi keperluan yang dinyatakan di bawah A 15 k 6 dan 10 KKM 2012 untuk membuktikan bahawa mereka mempunyai kepentingan undang-undang. Perayu telah gagal untuk mewujudkan kepentingan undang-undang mereka ke atas tanah tersebut (lihat perenggan 58–60).]

Cases referred to

Asia Life Assurance Society Ltd v Kong Leong Aik [1992] HCLJ 2053 (refd)

Boo Are Ngor (P) v Chua Mee Liang (P) (sued as public officer of Kim Leng Tze Temple) [2009] 6 MLJ 145; [2009] 6 CLJ 617, FC (refd)

Chin Wai Leong & Ors v PP and another appeals [2019] MLJU 1962; [2020] 7 CLJ 322, CA (refd)

Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors [2011] 1 MLJ 721, FC (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223; [1997] 1 CLJ 396, CA (refd)

Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd [1995] 2 MLJ 851, CA (refd)

New York Empire Sdn Bhd & Anor v Maswin Ripit & Ors [2014] MLRHU 880 (refd)
Newcastle City Council v Royal Newcastle Hospital [1959] 1 All ER 734, PC (refd)
Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers) [2003] 4 MLJ 647; [2003] 4 CLJ 533, CA (refd)
Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677, FC (refd)
Yamamoto Ryoji & Anor, Re [2021] 8 MLJ 386; [2020] 10 CLJ 75, HC (refd)

Legislation referred to

Rules of Court 2012 O 1A, O 15 rr 6, 10, O 42 r 13, O 89, O 89 rr 1, 2(1), 3, 4, 4(2), 5, O 92 r 4
Rules of the High Court 1980 (repealed by the Rules of Court 2012) O 15 r 6

Appeal from: Originating Summons No KCH-24–80/11 of 2016 (High Court, Kuching)

Allan Lao Puong Toong (with Lidwina Kiew and Charmaine Wong) (David Allan Sagah & Teng Advocates) for the appellant.
Clarine Chan (with Jenn Kiew) (Baru Bian Advocates) for the respondent.

Ahmad Nasfy JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal raises some important procedural points on intervention by non-parties and combining of consequential prayers in the application for intervention. It was brought by the first and second appellants ('appellants') against the whole decision of the learned judicial commissioner ('learned JC') in dismissing the appellants' notice of application dated 6 February 2018 via encl 8 to intervene in the proceedings and set aside the order for possession dated 13 December 2016 pursuant to O 15 r 6(2) and O 89 r 5 the Rules of Court 2012 ('the ROC 2012') respectively.

[2] Vide encl 8, in the court below, the following reliefs were sought:

(i) time to be extended for filing of the application (if any);

(ii) that leave be granted to the first and second proposed interveners herein to be added as parties/co-defendants to the proceedings;

(iii) in the event that the above prayer (ii) is allowed, the first and second proposed interveners intend to apply for the following orders:

(a) that the order for possession dated 13 December 2016 (encl No 6)

A as obtained by the plaintiff in the Originating Summons No KCH-24–80/11 of 2016 to be set aside;

(b) that the dispute between the plaintiff and the first and second proposed interveners to be tried in the Native District Court, Samarahan, which had been registered under the Case No DNC/KS/1/2017(C) and DNC/KS/2/2017(C).

B

(c) that costs be in the cause; and

(d) such further and other order as the court deems fit and just.

C

[3] In support of the said application, the following was relied upon and urged upon the court:

(a) it was in the interest of justice that the first and second proposed interveners be allowed to intervene; they being the rightful owners, having Native Customary Rights ('NCR') over the subject lands;

D

(b) the plaintiff had failed to comply with the law to serve all cause papers in respect of the action for summary possession of lands under O 89 of the Rules of Court 2012 ('the ROC 2012');

E

(c) the summary procedure for recovery of possession of the lands by way of affidavit evidence was not the correct mode of action for the recovery of the NCR lands;

F

(d) the summary action for recovery of possession of NCR lands was tainted with mala fide; and

(e) the dispute concerning NCR lands ought to be heard in the Native Court and that both parties have submitted to the jurisdiction of the Native Court.

G

[4] The learned JC, having heard the application, found that the proposed interveners are not entitled to the relief prayed for and dismissed the application with costs on 20 April 2018. Dissatisfied, the appellants appealed before us.

H

[5] We heard the appeal and after giving our most anxious and meticulous consideration to the facts and the submission from the learned counsel for the appellants as well as the learned counsel for the respondent, we are satisfied that there is no merit in the appeal. We accordingly and unanimously dismissed the appeal. The following are our grounds for arriving at that decision.

I

BACKGROUND FACTS

[6] On 9 October 2016, the respondent had filed an Originating Summons No KCH-24–80/11 of 2016 against the unnamed defendants ('OS') for recovery of vacant possession of an untitled parcel of land situated at the Kuching Bypass Road, Muara Tuang ('untitled parcel').

[7] Under the OS the respondent had admitted that the untitled parcel was at NCR land, and had claimed that he was the owner. The solitary document produced by the respondent as alleged proof of this was an alleged sale and purchase agreement with one Watt Gawing ('SPA').

[8] The appellants' stand is that the respondent is not the owner of the untitled parcel. In this regard:

(a) the untitled parcel essentially formed part of the NCR land situated within Kampung Merdang Gayam at Jalan Dato Mohd Musa, 94300 Kota Samarahan ('NCR land at Kampung Merdang Gayam') and NCR land at Kampung Mangka, Jalan Dato Mohd Musa, 94300 Kota Samarahan ('NCR land at Kampung Mangka') ('NCR lands'); and

(b) in fact, the issue of ownership of the said NCR lands is the subject matter of two ongoing Native Court claims under Native Court Cases No DWC/KS/1/2017(c) filed by the first appellant and No DNC/KS/2/2017(c) filed by the second appellant ('Native Court claims'). This had not been disputed by the respondent.

[9] According to the appellants, the order for possession dated 13 December 2016 ('OFP') was granted in favour of the respondent on 13 December 2016 under the OS, without their knowledge and they came to learn about it much later.

[10] At the material time, the first appellant, Jacy ak Tintang was the *Timbalan Ketua Kaum* of Kampung Merdang Gayam. He was and still acting on his own behalf and on behalf of the other 14 proprietors, occupiers, holders, and claimants of NCR land located within the said NCR land at Kampung Merdang Gayam.

[11] It is contended by the first appellant that evidence substantiating the above contention has been produced, and all depositions have been made through the affidavits filed in the High Court.

[12] The second appellant, Sup ak Bawong is the *Ketua Kaum* of Kampung Mangka. He is acting on his behalf and on behalf of the other 16 proprietors,

occupiers, holders, and claimants of NCR land located within the said NCR land at Kampung Mangka.

[13] The appellants had only found out about the OFP sometime in November 2017, when they had filed their respective Native Court claims for ownership of the said NCR Lands at the Native Court upon realising that there were trespassers on the said NCR lands.

[14] The appellants were taken by surprise when they received the respondent's defence filed in the Native Court together with some documents which included the OFP.

AT THE HIGH COURT

[15] At the High Court, the learned JC, after hearing the submission on preliminary issues raised by the learned counsel for the respondent and the submission on the substantive issues by both parties had ruled in favour of the respondent.

[16] For ease of reference, the preliminary issues were as follows:

(a) whether the OFP having been perfected, the court was functus officio to entertain the first and second proposed interveners' application to intervene; and

(b) whether the first and second proposed interveners' application to set aside the said OFP was in any event out of time.

[17] In summary, the learned JC found that the starting point for the court's consideration was O 89 r 5 of the ROC 2012 which reads as follows:

> Without prejudice to O 15 rr 6 and 10, any person not named as a defendant who is in occupation of the land and wishes to be heard *on the question whether and order for possession should be made may apply at any stage of the proceedings to* be joint as a defendant. (Emphasis added.)

[18] Order 15 r 6 of the ROC 2012 on the other hand provides that:

> (1) A cause of matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the matter.
>
> (2) Subject to this rule, *at any stage of the proceedings* in any cause or matter, the court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) ...

(b) Order any of the following persons to be added as a party namely. (Emphasis added.)

[19] Order 15 r 10 of the ROC 2012 provides that:

(1) Without prejudice to rule 6, the court may *at any stage of the proceedings* in an action for possession of immovable property order any person not a party to the action who is in possession of the immovable property (whether in actual is in possession or by a tenant) *to be added as a defendant*. (Emphasis added.)

[20] The learned JC had referred to the case of *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 wherein the Federal Court had the opportunity to consider the words 'at any stage of the proceedings' in O 15 r 6 of the then Rules of the High Court 1980 and held that:

[53] What conclusions can be drawn from the provision of O 15 r 6 of the RHC and the cases discussed above? I think, they are as follows.

[54] First an application to set aside an order for sale by an existing party to the proceeding may be made before the final order is perfected, otherwise the judge is functus officio.

[21] The learned JC had considered the learned counsel for the first and second proposed interveners submission who sought to distinguish the said authority among others, the following:

(a) that the case and principles therein concerned an intervener's application filed pursuant to O 15 r 6 of the ROC 2012 to set aside an order for sale, which is meant for the sale of auctioned property;

(b) on the other hand, the present case involved an intervention application filed pursuant to O 89 r 5 of the ROC 2012, which is specifically applicable in an application to intervene in a proceeding for summary possession of land;

(c) the proposed intervener/purchaser in that case had knowledge of the whole transaction involving the land and ought to have applied to intervene before the proceedings were concluded and the land was sold by public auction;

(d) on the other hand, the plaintiff herein had filed the originating summons without naming any defendants, therefore the plaintiff failed to comply with the strict rules of service under O 89 and that service of the cause papers was a triable issue; and

(e) the wordings and priorities or emphasis in O 89 r 5 and O 15 r 6 differed in that under the former the emphasis is on the person who 'wishes to be heard' before the words 'may apply at any stages of the proceedings'

whereas in the latter, the emphasis is on the words 'at any stage of the proceedings', which emphasised on the need to first ensure that there is a pending proceeding before the interveners could intervene. Thereafter, if the interveners wish to be made a party to the proceedings, he may then apply to be made as one.

[22] It is obvious that the learned JC, after having considered the above submissions was, less than impressed with the same and had stated the following reasons for rejecting the contentions:

(a) it was clear from the judgment of the Federal Court that although the court was dealing with O 15 r 6, the principles therein were applicable to other provisions in the ROC 2012 as the court expressly stated that 'O 15 r 6 of the RHC applies to all civil proceedings whether commenced by writ, motion or summons etc'; and

(b) there was no merit in the contention that the words 'wishes to be heard' in O 89 r 5 of the ROC 2012 are to be read with the provisions on the service of the originating summons. The service of the originating summons is already provided for under O 89 r 4 of the ROC 2012. It is clearly provided in O 89 r 5 that a party who was not named as a defendant in the action but wished to be heard may apply to be joined as a defendant. In addition, in reading the words 'at any stage of the proceedings' it must necessarily entail that the application must be made before an order of possession is made.

[23] As regards the contention that the service of the originating summons was improper and the process was not brought to the knowledge of the first and second proposed interveners, the learned JC ruled that pursuant to O 89 r 2(1) of the ROC 2012 that an acknowledgment of service of the originating summons is not required. In the present case the plaintiff had filed an affidavit of service under encl 3 and contrary to the contentions by the first and second proposed interveners, the plaintiff had duly complied with the provision under O 89 r 4(2) of ROC 2012 in that a copy of the originating summons together with the plaintiff's affidavit in support was affixed 'in a clear plastic file on the side of living quarters on the land' and by leaving another copy of the same in a sealed envelope addressed to the 'the occupiers' on the door of the workshop on the land.

[24] In conclusion, the learned JC held that the court was functus officio as the said order had already been perfected at the time of filing of this application.

[25] The learned JC in dismissing the application to set aside the OFP held that the filing of the application was out of time and was rendered academic.

However, for completeness, the learned JC proceeded to consider the submission of the parties and accordingly arrived at the following:

(a) the ROC 2012 provides for the time frame for the setting of aside of judgments and orders, wherein O 42 r 13 which reads as follows:

> Save as otherwise provided in these Rules, where provisions are made in these Rules for setting aside or varying of any order or judgment shall make an application to the court and serve it on the party who has obtained the Order or judgment *within thirty days after the receipt of the order or judgment by him*. (Emphasis added.)

(b) that O 42 r 13 of the ROC 2012 uses the word 'receipt' rather than 'service' of the order or judgment by the applicant. Thus, in the instant case, the applicants were deemed to have received the said order in November 2017 and as such, time would have already started to run. The 30-days' time period would have lapsed in December 2017. The present application was only filed on 6 February 2018 ie, two months thereafter. No explanation was given as to the delay.

[26] The learned JC had found it unnecessary to deal with other contention given the above conclusions and in the upshot, the application was dismissed with costs of RM3,000 in favour of the plaintiff subject to the payment of allocator.

THE APPEAL

[27] Before us learned counsel for the appellants sought to assail the decision of the learned JC and had canvassed six grounds of appeal which, for convenience, can be summarised as follows:

(a) the learned JC had erred in law and in fact when she failed to appreciate that O 89 of the ROC 2012 empowers the court itself to set aside the order made under O 89 of the ROC 2012 as it deem fit and just;

(b) the OFP obtained was tainted with mala fide and was made in breach of the sub-rules under O 89 of the ROC 2012;

(c) the respondent's advocate cannot in law act for the respondent as there exists a conflict of interest;

(d) the OS contained various triable issues, which are not suitable to be dealt with under O 89 of the ROC 2012;

(e) the appellants herein are equipped with native customary rights, substantiated with cogent evidence from the local *Ketua Kaum* and community leaders as compared to the unreliable evidence presented by the respondent; and

(f) even if there was a delay in filing the said NOA, there was a reasonable explanation, and the same is curable under O 1A or O 92 r 4 or the ROC 2012.

THE APPELLANTS' SUBMISSION

[28] Learned counsel for the appellants had in his oral submission, had strenuously relied upon lack of bona fide on the part of the plaintiff in the court below and the respondent before us in commencing the action by way of an originating summons. According to learned counsel, there is a sinister motive that behind the action which was to use the procedure under O 89 of the ROC to secure an order of possession which order will then be used to mislead the Land and Survey Department into granting a final title to be registered in his name. Put it differently it is contended that the filing of the OS and obtaining the OFP was for the collateral purpose of gaining a final title over the said NCR lands. This, it is argued, constitutes a clear abuse of the court's process. Thus, the court has the duty and power under its inherent jurisdiction to make the necessary orders to prevent this abuse (see *Boo Are Ngor (P) v Chua Mee Liang (P) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145; [2009] 6 CLJ 617 (FC)).

[29] It is further submitted that, based on O 89 r 3 of the ROC 2012, the respondent must file an affidavit in support of his OS stating that he does not know the name of any person occupying the land who is not named in the summons, and where the respondent is unable, after taking reasonable steps, to identify every person occupying the land for the purpose of making him a defendant, the respondent shall state in his affidavit that he has taken reasonable steps (describing them) to identify the persons occupying the land who are not named in the summons.

[30] Learned counsel further submitted that by using the machinery of the court against persons not named as defendants in the proceeding is an exceptional measure, and which can only be justified where the respondent claiming possession states positively in his supporting affidavit that he is unable to identify every person occupying the land for the purpose of making him a defendant after taking reasonable steps to do so.

[31] Again, the learned counsel for the appellant stressed that O 89 is only available to be invoked by those who had the rightful owner of the land and is entitled to claim possession of land against trespassers who remained in occupation without any license or consent.

[32] In the present case, again it is argued that there is conflicting and contradicting *evidence* presented in the High Court in respect of whether the

appellants are the rightful owners or trespassers of the NCR lands. This issue can only be determined in a trial proper says learned counsel.

[33] In addition, the appellants further submitted that the respondent was not telling the truth when he alleged that he had tried to contact and/or identify the unnamed defendants, but to no avail. Based on the respondent's Borang B filed to the Native Court in defending the appellants' claim, the respondent had explained upon enquiries at the Land Survey Department that he discovered in early 2012 that the said NCR Lands were alienated to Berlian Stabil Sdn Bhd. He then made a police report against Berlian Stabil Sdn Bhd claiming that this company had destroyed all the oil palm trees and had constructed quarters on the lands. Learned counsel for the appellants submitted that if the alleged claim is true, the respondent would have been well aware of the identity of at least one party (the company, Berlian Stabil Sdn Bhd) who was allegedly trespassing the said NCR lands at the material time. Therefore, the respondent was not telling the truth in his affidavit in support of the OS when he stated that he had tried to contact and/or identify the defendants but to no avail.

[34] In light of the above circumstances it was submitted that O 89 r 1 of the ROC 2012 is not a proper procedure to be employed especially where there is a dispute on facts. In conclusion, it was reiterated that the appellants have successfully raised triable issues that merit a full trial.

THE RESPONDENT'S SUBMISSION

[35] Learned counsel for the respondent had raised threepreliminary points in opposing the appeal. There are as follows:

(a) that it is not proper to have two applications pursuant to two separate orders in the Rules of Court 2012, rolled into one notice of application;

(b) that the court is functus officio to entertain the appellants' application as at the time of the application the OFP was already perfected; and

(c) that the application to set aside the OFP was made out of time.

[36] Learned counsel submits that a reading of the notice of application showed that the application was made brought under O 89 r 5 for the appellants to be made co-defendants of the OS. However, the authorities cited in submissions of the appellants indicated that the application was also to intervene under O 15 r 6 (see *Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd* [1995] 2 MLJ 851). The requirements for each application are different. In this regard, is pointed out that the requirements for an application to intervene under O 15 r 6 are separate from that of an application under O 89 r 5 (see *Asia Life Assurance Society Ltd v Kong Leong*

Aik [1992] HCLJ 2053).

[37] It is further submitted that an application under O 89 r 5 can only be brought by occupants of the land. Whilst an application under O 15 r 6 requires the applicant to have a legal interest and it is not necessary to be an occupant of the land.

[38] Since the appellants brought this application under O 89 r 5, learned counsel for the respondent submitted that the appellants should not be allowed to muddy this application with an attempt to 'intervene'. The appellants should be bound by the parameters set in their application.

[39] It is further submitted that any application to intervene must be made under O 15 r 6 and it must be filed before the final order is given. In the instant case, the appellants have not done as required under the law. Hence their attempt to intervene was rightly dismissed by the learned JC in the following way:

> The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the court of chancery, is of universal application. *Even in cases where a right is exercisable ex debito justitiae*, a court may refuse relief to an indolent litigant.
>
> In all cases in which delay in approaching the court is in issue, *the burden is upon the litigant who has delayed to render a satisfactory or reasonable depends upon the facts and circumstances of each case*. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

[40] The appellants, according to learned counsel, had also not acted with promptitude after receipt of the OFP. Thus, the court ought not to aid the indolent appellants and accordingly the appeal ought to be dismissed with costs on this ground alone.

[41] It is submitted that pursuant to O 42 r 13 of the ROC 2012 the setting aside of an order or judgment ought to be done within 30 days of the receipt of such order or judgment. In this regard, the first appellant had admitted to receiving the cause papers in relation to an OFP possession in November 2017 (see para 12 of affidavit in support and affidavit in support (2) respectively). Hence, any application to set aside must be brought at the latest, by December 2017.

[42] The appellants' notice of application was dated 6 February 2018 ie, three months from the date of receipt of the OFP and no reason was given for the delay of such action.

[43] Learned counsel brought to our attention to the decision of this court

when addressing this similar issue in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 at p 229; [1997] 1 CLJ 396 where at paras D-H the following was stated:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that effects his rights he must do so timeously.

Occupation of the lands

[44] In respect of intervention, learned counsel for the respondent argued that after obtaining an OFP under O 89 of the ROC 2012, the respondent had persisted in his attempt to identify the parties in occupation of his land, but it was to no avail.

[45] Learned counsel for the respondent argued that in order to apply to be a co-defendant pursuant to O 89 r 5 of the ROC 2012, the appellants need to show that they are in occupation of the subject land. The appellants should provide evidence of the same, by exhibiting evidence like quit rent or utility bills, etc. They also ought to exercise a 'sufficient measure of control to prevent strangers from interfering'. This is the meaning of 'occupation' (see *New York Empire Sdn Bhd & Anor v Maswin Ripit & Ors* [2014] MLRHU 880, *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677 (FC), *Newcastle City Council v Royal Newcastle Hospital* [1959] 1 All ER 734).

[46] According to learned counsel, the appellants' affidavits clearly established that they are not in occupation of the lands. They never stated that they were the ones who cultivated the lands. On the other hand, the exhibits show that the respondent was in occupation of lands.

Out of time to be made a co-defendant

[47] It is submitted that the appellants are out of time to make this application as the matter had concluded and the application was not made at 'any stage of the proceedings' as provided under O 89 r 5 of the ROC 2012. The respondent reiterate that the appellants application was out of time based on the following timeline:

(a) the originating summons was filed in November 2016;

(b) the order for possession was made in December 2016;

(c) the OFP was served in January 2017;

(d) the papers were sighted by the appellants in November 2017; and

(e) the application was made in February 2018.

[48] It is submitted that no reason was proffered by the appellants for the delay. Thus, the merits of the application need not be considered and should be dismissed *in limine* (see *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)* [2003] 4 MLJ 647; [2003] 4 CLJ 533 (CA)).

[49] Learned counsel for the respondent submitted that the learned JC was correct in her decision to dismiss the application. For the aforesaid reasons, the appeal should be dismissed with costs.

OUR DECISION

[50] Upon hearing the submission from both parties, we are of the view that the pivotal point that must first to be determined in the instant appeal is whether the learned JC is correct in dismissing the appellants' application solely based on the two preliminary points without considering other remaining issues canvassed in the appellants' submission.

Whether the court is functus officio

[51] Every so often one listens, and submissions have been made about a judge being functus office. It simply means, in connection with of judicial function, the coming to an end of the function. This must also necessarily denote that there is no residual power or authority to entertain any further application to carry out a further function. Once the power is spent, nothing left could be done.

[52] In the case of *Chin Wai Leong & Ors v Public Prosecutor and another appeals* [2019] MLJU 1962; [2020] 7 CLJ 322 this court quoted the definition of 'functus officio' as found in *Words and Phrases Judicially Defined* (1990 Ed) as follows:

> It is not clear how the words functus officio crept into the order appealed from Functus Officio means a person who has discharged his duty or whose office of authority is at and end (see *Bedwell v Wood* [1877] 2 QBD 626). Thus, once a president has convicted a person charged with an offence before him, he is functus officio, and cannot rescind the sentence and retry the case. Similarly, once he has tried a civil action and made an order on the final determination of the dispute between the parties, he is functus officio and cannot rescind his final order and retry the case of try a subsequent action between the same parties on the same subject matter.

In the case of in *Re Yamamoto Ryoji & Anor* [2021] 8 MLJ 386; [2020] 10 CLJ 75, the court held that:

On the consent judgment ('order') had been perfected, the court cannot vary any of the agreed terms unless with the mutual consent of the parties. Hence, one can say thatthe court is functus officio or in other word, the court is bereft of jurisdiction to entertain any request to set aside such judgment.

[53] In the context of the present case, we agree with the decision of the learned JC and sustain the submissions of the respondent that the application by the appellants cannot be said to have been made 'at any stage of the proceeding' as at the time when the application was made the order has been perfected and accordingly there is no other proceeding pending.

Whether the appellants' application to set aside the order of possession was made out of time?

[54] As stated earlier, O 42 r 13 of the ROC 2012 provides for time frame for the filing of any application for the setting aside of the judgments or orders, ie within thirty days after the receipt of the order or judgment by him.

[55] It is not in dispute that the appellants first sighted the said order sometime in November 2017 when they received the respondent's defence under Borang B for the Native Court Case No(s) DNC/KS/1/2017(c) and DNC/KS/2/2017(c). O 42 r 13 used the word 'receipt' rather than 'service' of the order of judgment. Therefore, the appellants were deemed to have received the said order in November 2017. As such the 30 days' time would have lapsed in December 2017. The appellants only filed the application to set aside the order for possession on 6 February 2018 ie two months thereafter. Therefore, the court will not entertain such application as it was out of time (see *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1997] 1 CLJ 396; *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)* [2003] 4 MLJ 647; [2003] 4 CLJ 533).

[56] As regards to the approach taken by the learned JC in deciding not to consider other grounds, we wish to state that such an approach is not desirable although we must be quick to point out that such an approach cannot, *ipso facto*, amount to a misdirection upon which an appeal must in all necessity be sustained. For our part we will now consider the following issues:

(a) whether the appellants have locus to be made a co-defendant to the proceeding? and

(b) whether it is proper to have two applications pursuant to two separate orders in the ROC 2012 into one notice of application ie O 89 r 5 and O 15 r 6 respectively.

[57] As alluded to earlier, O 89 r 5 of the ROC 2012 provides that any party

seeking to be made a party to the proceeding must show that they are in occupation of the land.

[58] Upon perusal of the appellants' affidavits, we found that they are not in occupation of the lands. The affidavits indicate that only two villagers had cultivated the land or used it for farming. They averred that they knew of people trespassing on the land since 2012. Yet no legal action was taken to exercise any 'measure of control to prevent strangers from interfering (see *Madeli bin Salleh* (FC)). It is undisputed fact that even the appellants had been well aware of the unknown people on the lands and yet they did not any immediate steps to make a police report that they were the occupant of the land and cultivated the same. Given that the appellants are not the occupant of the land they have no locus to bring this application pursuant to O 89 r 5.

[59] It is also germane to observe and it is also not disputed that the appellants had filed in one application seeking to be made co-defendant pursuant to O 89 r 5 and at the same time made an application to intervene under O 15 r 6 of the ROC 2012. It is trite that the requirements for each application are different. The requirements for an application to intervene under O 89 r 5 are separate from that of an application under O 15 r 6. Under O 15 r 6 requires the appellants to have legal interest. We are of the view that given the different legal consideration that underlies each application it is undesirable for two separate applications to be lumped into one notice of application.

[60] In any event even if the same could be made, which we must express our disagreement to the same, the appellant must pertinently abide by the requirements stated under O 15 rr 6 and 10 of the ROC 2012 to establish that they have a legal interest. In this case, we are mindful to state that the appellants had failed to establish their legal interest on the land (see *Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors* [2011] 1 MLJ 721 (FC)).

CONCLUSION

[61] Based on the aforesaid reason, we hereby unanimously dismissed the appeal with costs of RM8,000 subject to allocator fee and accordingly the decision of the High Court dated 20 April 2018 is affirmed.

Appeal dismissed with costs.

Reported by Ahmad Ismail Illman Mohd Razali